General Manager of the customer company. Surely, service on him would be sufficient service on the company.

We would for these reasons allow the appeal with costs here and below. The deposit is to be refunded to the appellant.

KANDIAH PETER A/L KANDIAH

v.

PUBLIC BANK BHD.

SUPREME COURT, IPOH
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR LP, TAN SRI DATO' MOHD EUSOFF BIN CHIN SCJ, DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 02-534 OF 1991]
28 OCTOBER 1993

PRACTICE & PROCEDURE: Foreclosure proceedings - Chargor raising issues and relying upon facts to show "cause to the contrary" - Order for sale granted - Chargor bringing action seeking declaration that charges and annexures null and void and for consequential relief - Chargor raising issues and relying upon facts identical to those raised in foreclosure proceedings - Whether doctrines of issue estoppel or cause of action estoppel or res judicata applicable to bar chargor's action.

The appellant had charged certain lands to the respondent. The respondent applied for orders for sale of the appellant's lands which application was granted. The appellant unsuccessfully applied to set aside one of these orders and, with equal lack of success, resisted the making of the other order.

The appellant subsequently took out a writ action claiming for a declaration that the charges and annexures relating to the lands are null and void and for consequential relief. The trial Judge found as a fact that the issues and facts raised and relied upon by the appellant in his statement of claim were identical to those raised by the appellant in the foreclosure proceedings under s. 256 of the National Land Code 1965 (the Code).

The trial Judge held that the appellant was estopped by *res judicata* from raising in the subsequent action the identical issues which he had raised in the foreclosure proceedings and dismissed the appellant's claim.

Held:

[1] A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the

chargor in default. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issues.

[2] In order for the doctrines of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree. This requirement is not met by foreclosure proceedings which do not result or terminate in a final judgment or decree.

[3] Where a chargor raises issues and relies upon facts to show "cause to the contrary" in proceedings brought by the chargee under s. 256 of the Code, he is not barred from bringing a fresh action against the chargee, notwithstanding that an order for sale has been made, and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

[Appeal allowed. Order of trial Judge dismissing suit set aside. Re-trial of the action ordered. Costs to follow the event of the re-trial].

[Bahasa Malaysia Translate of Headnote]

AMALAN DAN PROSEDUR: Prosiding halang tebus - Penggadai membangkitkan isu dan bergantung kepada fakta-fakta untuk menunjukkan "kausa yang bertentangan" - Perintah bagi jualan diberikan - Penggadai memulakan tindakan memohon perisytiharan bahawa gadaian-gadaian dan lampiran-lampiran terbatal dan tidak sah dan bagi relief berbangkit - Penggadai membangkitkan isu-isu dan bergantung kepada fakta-fakta yang serupa dengan yang dibangkitkan di dalam prosiding halang tebus - Sama ada doktrin-doktrin isu estopel atau kausa tindakan estopel atau res judicata terpakai untuk menghalang tindakan penggadai.

Perayu telah menggadaikan beberapa bidang tanah kepada responden. Responden memohon perintah untuk menjual tanah-tanah perayu di mana permohonan tersebut telah diberikan. Perayu telah memohon dan gagal untuk mengenepikan salah satu daripada perintah-perintah tersebut dan gagal menentang pemberian perintah yang satu lagi.

Kemudiannya perayu mengambil suatu writ tindakan menuntut untuk perisytiharan bahawa gadaian-gadian dan lampiran-lampiran yang berhubung dengan tanah-tanah tersebut adalah terbatal dan tidak sah dan bagi relief berbangkit. Hakim perbicaraan mendapati sebagai suatu fakta bahawa isu-isu dan fakta-fakta yang dibangkitkan dan yang mana perayu bergantung kepada di dalam pernyataan tuntutannya adalah serupa dengan yang dibangkitkan oleh perayu di dalam prosiding halang tebus di bawah s. 256 Kanun Tanah Negara 1965 (Kanun tersebut).

Hakim perbicaraan memutuskan bahawa perayu diestopkan oleh *res judicata* daripada membangkitkan dalam tindakan selanjutnya akan isu-isu yang serupa yang telah dibangkitkannya di dalam prosiding halang tebus dan menolak tuntutan perayu.

Diputuskan:

[1] Pemegang gadaian yang membuat permohonan untuk sesuatu perintah jualan di dalam prosiding halang tebus di bawah s. 256 Kanun tersebut tidak memulakan tindakan. Dia cuma menguatkuasakan hak-haknya sebagai pemegang gadaian dengan mengamalkan remedi statutorinya terhadap penggadai yang ingkar. Apabila perintah jualan dibuat di bawah s. 256 Kanun tersebut, ia bukan merupakan suatu penghakiman atau dekri. Mahkamah yang membicarakan permohonan untuk halang tebus tidak membuat, dan walau apa pun jua tidak harus membuat, apa-apa penghukuman atas sebarang isu substantif.

[2] Untuk membolehkan terpakainya doktrin-doktrin *res judicata*, kausa tindakan estopel atau isu estopel, prosiding awal haruslah membawa kepada keputusan suatu penghakiman muktamad atau dekri. Kehendak ini tidak dipenuhi oleh prosiding halang tebus yang tidak membawa kepada keputusan atau menamatkan penghakiman muktamad atau dekri.

[3] Di mana penggadai membangkitkan isu-isu dan bergantung kepada fakta-fakta untuk menunjukkan "kausa yang bertentangan" di dalam prosiding yang dimulakan oleh pemegang gadaian di bawah s. 256 Kanun tersebut, dia tidak dihalang daripada memulakan suatu tindakan baru terhadap pemegang gadaian, meskipun bahawa perintah jualan telah dibuat,

dan di dalam tindakan tersebut membangkitkan fakta-fakta dan isu-isu yang sama atau serupa dengan yang dibangkitkan olehnya di dalam prosiding halang tebus. Baik *res judicata* ataupun kausa tindakan estopel mahupun isu estopel tidak merupakan jawapan bagi pemegang gadaian untuk menjawab tindakan penggadai.

[Rayuan dibenarkan. Perintah Hakim perbicaraan menolak guaman diketepikan. Perbicaraan semula tindakan tersebut diperintahkan. Kos mengikut keputusan perbicaraan semula].

Cases referred to:
V.R.K.R.S. Chettiappah Chetty v. Raja Abdul Rashid Ibni Almerhum Sultan Idris [1933] MLJ 18 ***(foll)***
Murugappa Chettiar v. Letchumanan Chettiar [1939] MLJ 296 ***(refd)***
Mercantile Bank of India v. T.F. Egan & Anor. [1940] MLJ Rep. 288 ***(refd)***
Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd. [1988] 1 CLJ 8 / [1988] 1 MLJ 257 ***(refd)***

Legislation referred to:
Land Code 1926, s. 149
National Land Code 1965, s. 256

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 16, para 1519

For the appellant - Sri Ram (Chan Kok Keong with him); M/s. Chan & Associates
For the respondent - Kerpal Singh (John Concisom with him); M/s. Concisom & Co.

JUDGMENT

Mohd Eusoff bin Chin SCJ:
This appeal raises a short but important point. At the conclusion of arguments, we allowed the appeal and ordered a re-trial. We now give our reasons for doing so.

Facts:

The facts so far as are relevant to this appeal are as follows:

The appellant had charged certain lands to the respondent in circumstances which we do not propose to elaborate in view of the order for re-trial we have made. Those circumstances sufficiently appear in the judgement of the learned trial Judge.

By two originating summonses (which, for convenience, we will refer to in this judgment as "the foreclosure proceedings") taken out by the respondent (as Chargee/Plaintiff) against the appellant (as Chargor/ Defendant) the respondent applied for orders for sale of the appellant's lands. The applications were made pursuant to the provisions of s. 256 of the National Land Code, 1965 (hereinafter, "the Code"). Orders for sale were granted by the Court. The appellant had unsuccessfully applied to set aside one of these orders for sale and had with equal lack of success resisted the making of the other order.

Having failed, the appellant, on 23 November 1989, took out the writ in the present action claiming, *inter alia*, for a declaration that the charges and annexures relating to the appellant's lands are null and void, and for consequential relief. In his statement of claim, the appellant raised and relied upon facts and issues which the learned Judge found to be identical to those raised by the appellant in the foreclosure proceedings under s. 256 of the Code. In the circumstances the learned trial Judge, after hearing oral evidence and submissions, dismissed the appellant's claim mainly, if not solely, on the ground that the matter was covered by the doctrines of estoppel and *res judicata*.

Having read the cause papers in the foreclosure proceedings and having compared them with the statement of claim, all of which are contained in the record of appeal, we are in agreement with the learned Judge on his finding that the issues raised by the appellant in the foreclosure proceedings and in the present action are indeed identical. The only question that remains is whether the doctrines of issue estoppel or cause of action estoppel or *res judicata* are applicable in these circumstances to bar the appellant's present action.

The law:

The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely **enforces** his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a convenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a

decree. The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our Courts which have correctly stated the law upon the subject. In *V.R.K.R.S. Chettiappah Chetty v. Raja Abdul Rashid Ibni Almerhum Sultan Idris* [1933] MLJ 18, the appellant (chargee) had taken a summons under s. 149 of the Land Code 1926 for an order of sale of the charged premises. The respondent pleaded that he could not be sued because there was an order in Council dated 8 January 1988 which stated:

> No Member of the royal family of Perak (Waris Negeri) is liable **to be sued for debt** in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident.

Apparently no permission had been obtained as required by the order in Council. Thorne Ag. CJ in the Court of Appeal held:

> It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the Court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.
>
> I am of opinion that the notification has no application whatsoever to the case of the chargee's application under s. 149 of the Land Code. The applicant does not commence an action or suit and does not file a plaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt,' but he applies for leave to exercise his rights as a chargee. **The proceedings result not in a judgment or decree, but in the making or refusal of an order of sale.**
> (emphasis added)

That decision was followed in *Murgappa Chettiar v. Lechumanan Chettiar* [1939] MLJ 296; *Mercantile Bank of India v. T.F. Egan & Anor.* [1940] MLJ Rep. 288; and *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* [1988] 1 MLJ 257.

It is equally settled law that in order for the doctrines of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a **final** judgement or decree: **Halsbury's Laws of England,** 4th Edn., Vol. 16, para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.

In our judgment, where a chargor raises issues and relies upon facts to show "cause to the contrary" in proceedings brought by the chargee under s. 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

Accordingly, we find that the learned Judge was in error when he held that the appellant was estopped, *inter alia*, by *res judicata*, from raising in the subsequent action the identical issues which he had raised in the foreclosure proceedings.

Conclusion:

In the circumstances, we made the following orders:

(i) that the appeal be allowed;
(ii) that the order of the learned trial Judge dismissing the suit be set aside;
(iii) that there be a re-trial of the action;
(iv) that the costs of the first trial, this appeal and the re-trial do follow the event of the re-trial.